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No. 88-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RONALD ALMAN, as Trustee, BOARD of TRUSTEES, NORTHEAST DEPARTMENT ILGWU HEALTH and WELFARE FUND, ILGWU HEALTH SERVICES PLAN, and ILGWU NATIONAL RETIREMENT FUND,

Petitioner,

v.

GEORGE MANUFACTURING CORP.

and

GEORGE KALELL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONER

GERALD M. FEDER
DAVID R. LEVIN *
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

* (Counsel of Record)

Dated: January 1989

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the National Coordinating Committee for Multiemployer

Plans (the "NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to review the decision below that a dominant corporate owner/officer cannot be liable for delinquent benefit fund contributions, under Title I of the Employee Retirement Income Security Act ("ERISA"), absent a piercing of the corporate veil. Petitioner has consented to the filing of this brief; Respondents have not.

Interest of the National Coordinating Committee for Multiemployer Plans

The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of ERISA to represent the interests of multiemployer plans and their participants in the development of employee benefit legislation and government regulations under ERISA and other laws. More than 190 multiemployer plans (including those of which the Petitioner is trustee) and related international unions are members of the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than nine million workers and their families.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical, negative implications of the decision below for multiemployer plans and to state the position of trustees, participants, and beneficiaries of such plans. In fact, the NCCMP has recently participated as an *amicus curiae* in *Connolly v. PBGC*, 475 U.S. 211 and *Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. ——, 91 L.Ed.2d 936 (1988).

As set forth herein, the NCCMP submits that the decision below undermines the national employee benefits policy established by Congress. Affirmance of the decision below would have a significant adverse impact on the financial stability of the nation's multiemployer pension and welfare plans, the benefit security of millions of plan participants and their families, and the federal program that insures certain of these benefits.

The impact of the decision below is to force multiemployer pension plans to provide benefits for services rendered, while denying these plans their full statutory causes of action to collect the contributions that should have been paid for those services. Similarly, the decision below forces multiemployer welfare benefit plans to cease providing medical and other benefits to employees whose employers have reaped the benefits of their labors but refused to fund the benefits for which they labored. Such results are totally at odds with the purposes of ERISA. *See, e.g.*, 29 U.S.C. §§ 1001(b), 1001a.

The NCCMP's brief focuses on issues which it believes may not be adequately presented elsewhere, including:

(a) The particularly adverse impact that the holding below will have on national employee benefits policy and the multitude of multiemployer plans represented by the NCCMP, and

(b) The fundamental conflict between the reasoning in decisions of this Court—as well as those of the First Circuit and her sister Circuits—and the decision of the First Circuit in this case.

The NCCMP respectfully requests that it be permitted to present its views on the decision of the court below, which decision directly affects the present benefits and

future security of the millions of participants whose interests it represents. The NCCMP, therefore, moves for leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

GERALD M. FEDER
DAVID R. LEVIN *
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

Dated: January 1989

* (Counsel of Record)

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONER

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") submits this brief *amicus curiae* to urge the Court to review the decision below that a dominant corporate owner/officer cannot be liable for delinquent benefit fund contributions under Title I of the Employee Retirement Income Security Act ("ERISA"), absent a piercing of the corporate veil.

I. Interest of the National Coordinating Committee for Multiemployer Plans

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. 29 U.S.C. § 1001. The legislative history of ERISA—both as enacted in 1974 and as amended in 1980—confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring the funding of multiemployer plan benefits through timely payment of employer contributions is one of the statute's principal objectives. *See id.*; 29 U.S.C. § 1001a.

The decision below is contrary to these Congressional goals. It is to elaborate upon these concerns that the NCCMP has filed this brief. As set forth herein, the NCCMP submits that the decision below undermines the national employee benefits policy established by Congress. Affirmance of the decision below would have a significant adverse impact on the financial stability of the nation's multiemployer pension and welfare plans, the benefit security of more than nine million participants and their families, and the federal program that insures certain of these benefits.

The necessary predicate to maintaining the legally mandated financial integrity of multiemployer pension and welfare benefit plans is the implementation of an ongoing system to collect employer contributions. The inability to collect these contributions can lead to inadequate funding of the multiemployer plans involved.

The impact of the decision below is to force multiemployer pension plans to provide benefits for services rendered, while denying these plans their full statutory causes of action to collect the contributions that should have been paid for those services. Similarly, the decision

below forces multiemployer welfare benefit plans to cease providing medical and other benefits to employees whose employers have reaped the benefits of their labors but refused to fund the benefits for which the employees labored. Such results are totally at odds with the purposes of ERISA. *See, e.g.*, 29 U.S.C. §§ 1001(b), 1001a.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. 29 U.S.C. § 1001. The legislative history of ERISA—both as enacted in 1974 and as amended in 1980—confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring the funding of multiemployer plan benefits through timely payment of employer contributions is one of the statute's principal objectives. *See, id.*; 29 U.S.C. § 1001a. The decision below is contrary to these Congressional goals. It is to elaborate upon these concerns that the NCCMP has filed this brief.

II. Reasons for Review

A.

The purpose of multiemployer benefit trusts and the policy underlying the statute which regulates those trusts are one and the same: to protect the interests of participants and to ensure the receipt of promised benefits. *See* 29 U.S.C. §§ 186(c)(5), 1001(b). The assets of multiemployer benefit trusts consist initially of employer contributions, which trustees have a statutory duty to try to collect. *See* 26 U.S.C. § 412; 29 U.S.C. §§ 1082, 1104, 1106, 1132(g)(2), 1145.

ERISA, as enacted in 1974, provided a cause of action for multiemployer plan trustees to collect delinquent contributions. *See, e.g., National Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218, 1219-20 (D.C.

Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). Moreover, ERISA, as enacted in 1974, provided a basis for holding a dominant corporate owner/officer personally liable for payment of delinquent contributions, without resort to judicial corporate veil-piercing. *Laborers' Fringe Benefit Funds—Detroit and Vicinity v. Northwest Concrete & Constr., Inc.*, 640 F.2d 1350, 1352-53 (6th Cir. 1981).[1]

In 1980, ERISA was amended.[2] These amendments were prompted by Congressional anxiety about the financial stability of multiemployer plans and concern that the maintenance and growth of such plans were being discouraged. *See generally* Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980). Nowhere in these amendments is there an express repeal of the aforementioned ERISA cause of action to collect delinquencies from corporations and their dominant owner/officers. And, "it is a venerable rule, frequently reaffirmed by the Supreme Court that 'repeals by implication are not favored, and will not be found unless an intent to repeal is 'clear and manifest.'" *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1984) (citations omitted).

The 1980 amendments were designed, *inter alia*, "to strengthen the funding requirements and enhance the

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[1] In *Northwest Concrete*, the Sixth Circuit reversed the district court's refusal to enjoin the corporation and the individual from future failures to contribute; the district court's judgments against the owner/officer personally and against his corporation were not challenged on appeal. In fact, the Sixth Circuit opinion states that the owner/officer had been ordered to pay delinquent contributions in other cases, too. *Id.*, 640 F.2d at 1353 n.4.

[2] The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208 (1980). Although *Northwest Concrete* and *Commercial Roofing* were finally decided after ERISA was amended, both cases were brought and decided under the provisions of ERISA as enacted in 1974.

financial stability of multiemployer . . . plans," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981), by assuring that trustees will have the ability to recover delinquent contributions quickly and effectively. *Accord, Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); 29 U.S.C. §§ 1132(g)(2), 1145.

In this regard, the drafters of the 1980 amendments to ERISA expressly focused on five judicial decisions:

> In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, —— F. Supp. ——, 103 LRRM 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097, USDC D.C., April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23,288 (1980) (statement of Sens. Williams and Javits). One of the cases cited by the Congressional drafters—*Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*—involved the personal liability of an owner/officer for delinquent contributions.[3]

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[3] It is unclear from the *McDowell* opinion whether the owner/officer's businesses were incorporated. The district court's decision, denying the multiemployer fund its sought-after relief, was "considered to be incorrectly decided" by the drafters of the 1980 Amendments to ERISA. The decision of the district court was eventually reversed, 673 F.2d 1341 (9th Cir. 1982).

In its summary affirmance of the district court's decision in the instant case, the First Circuit stated that its decision in *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988) is controlling. In *Starrett*, the First Circuit concluded: "We cannot say, under *state* or other relevant federal law that [the dominant owner/officer] simply *is* the corporation . . . [W]e therefore cannot say that the corporation's promise to pay 'is' [the dominant owner/officer's] promise." *Id.* at 24 (emphasis in original). Yet, under ERISA, the dominant owner/officer is the "employer". ERISA defines "employer" as:

> *any person* acting directly as an employer or indirectly in the interest of an employer, in relation to an employee benefit plan. . . .

29 U.S.C. § 1002(5) (emphasis added). A "person" is defined under ERISA as:

> *an individual*, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization.

29 U.S.C. § 1002(9) (emphasis added).

So, for example, under the plain language of ERISA and the applicable regulation of the Department of Labor, "a fiduciary is a 'person' . . . under the definition of person contained in [ERISA] section 3(9)." 29 C.F.R. § 2509.75-5 (1987). If the term "person" is defined as excluding corporate officers, then a corporate officer, by definition, cannot be a fiduciary under ERISA. Yet, the federal judiciary has consistently held that corporate officers can be fiduciaries. *E.g., Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984). *Accord* DOL ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (1987). Consequently, an

interpretation of the term "person" under ERISA to exclude corporate owner/officers proves too much.[4]

B.

The First Circuit's decisions in *Starrett* and the instant case directly conflict with the position of the Sixth Circuit in *Northwest Concrete* and the more recent decisions in *West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co.*, 685 F. Supp. 953 (D.W.Va. 1988) and *Gambino v. Index Sales Corp.*, 673 F. Supp. 1450 (N.D. Ill. 1987).[5] Both the *Gambino* court in the Seventh Circuit and the *Ball Electric* court in the Fourth Circuit held that a corporate owner/officer can be liable for delinquent contributions under ERISA, without resort to judicial corporate veil-piercing.

The federal courts have had no difficulty in finding corporate officers liable under ERISA for fiduciary breaches. *See, e.g., Blatt v. Marshall and Lassman*, 812 F.2d 810 (2nd Cir. 1987); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641 (W.D. Wis. 1979). *Accord, Dardaganis v. Grace Capital, Inc.*, 664 F. Supp. 105 (S.D.N.Y. 1987); *McNeese v. Health Plan Mktg., Inc.*, 647 F. Supp. 981 (N.D. Ala. 1986); *Brock v. Self*, 632 F. Supp. 1509 (W.D. La. 1986). And, the liability imposed in these cases is personal liability.

Since long before the enactment of ERISA, the judiciary has acknowledged "the broader equitable principle

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[4] ERISA also provides that it is unlawful for "any person" to interfere with a plan participant's right to benefits through the use of fraud, force, violence, suspension, fine, or discharge. 29 U.S.C. §§ 1140, 1141. Surely, Congress did not intend to permit corporate owner/officers to interfere with impunity.

[5] The D.C. and Third Circuits have refused to find corporate owner/officers liable as "employers", under ERISA. *International Brotherhood of Painters and Allied Trades Union, et al. v. George A. Kracher, Inc., et al.*, 856 F.2d 1546 (D.C. Cir. 1988); *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985).

that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). *See Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *Capital Tel. Co. v. FCC*, 498 F.2d 724, 738 (D.C. Cir. 1974) and cases cited therein. And, regarding the personal liability of corporate owner/officers under ERISA, the First Circuit holds that ERISA "cannot be said to attach great weight to corporate form." *Danin*, 801 F.2d at 2. The First Circuit's position in *Danin* simply cannot be squared with the First Circuit's position in *Starrett* and the instant case, insulating dominant corporate owner/officers from liability for their own actions.

National employee benefits policy underscores that "the continued well-being and security of millions of employees, retirees and their dependents are directly affected by multiemployer plans," 29 U.S.C. § 1001a(a)(3). Therefore, the Congress has not only endeavored to foster multiemployer plan continuation and growth, but it has also established "that minimum standards be provided assuring the financial soundness" of these plans, 29 U.S.C. § 1001(a).

Contributions are the life-blood of employee benefit plans. Consequently, the failure to make contributions constitutes irreparable harm to plans. *See Northwest Concrete*, 640 F.2d at 1353; *Painters Pension Fund v. Hartline-Thomas, Inc.*, 4 Employee Benefits Cas. (BNA) 1199, 1200 (D.D.C. 1983); *Central States, Southeast and Southwest Areas Pension & Health and Welfare Funds v. McNamara Motor Express, Inc.*, 503 F. Supp. 96, 98-99 (W.D. Mich. 1981); *Central States, Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*, 472 F. Supp. 1243, 1247 (E.D. Mich. 1979). When an employer—acting through its dominant owner/officer—is able to avoid paying contributions to welfare benefit plans, plan participants are denied the medical

and other benefits for which they labored. For, the plans generally cannot provide benefits that the employer refuses to fund.

Trustees are interested in maximizing the collection of delinquent contributions, and thereby ensuring the uninterrupted payment of benefits. So it is that in the many years that the NCCMP has been in existence, not one of the hundreds of plan trustees represented by the NCCMP—trustees appointed by labor and by management—has ever requested that the NCCMP take a position against personal liability of corporate owner/officers. Neither have any of the millions of plan participants and beneficiaries made such a request. For, the imposition of liability on corporate owner/officers enhances, rather than detracts, from the financial stability of multi-employer plans.

C.

The First Circuit has ignored the reasoning of the judicial decisions under the Fair Labor Standards Act ("FLSA"), even though the FLSA, like ERISA, defines an "employer" as one who acts "directly or indirectly in the interest of an employer . . ." 29 U.S.C. § 203(d). The FLSA provides *inter alia* that "[e]very employer shall pay [minimum wages] to each of his employees . . ." 29 U.S.C. § 209(a).

Between the enactment of the FLSA and the enactment of ERISA in 1974, the federal judiciary had numerous opportunities to construe the definition of "employer" under the FLSA. Often was it argued that since the corporation—not its owner/officer—has employees, only the corporation has the obligation "to pay" described in the FLSA. Yet, in determining who was an "employer" with an obligation "to pay" under the FLSA—*i.e.*, whether only the corporation or also the owner/officer, albeit he/she literally has no employees but does come within the statutory definition of "employer"—the Supreme Court adopted an "economic reality" test. *See Goldberg v.*

Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (recognizing the "expansiveness" of the FLSA definition of "employer"); *Falk v. Brennan*, 414 U.S. 190, 195 (1973). *Accord, NLRB v. Hearst Publications*, 322 U.S. 111, 129 (1944) (similar definition of "employer" under NLRA "to be determined broadly . . . by underlying economic facts rather than technically and exclusively by previously established legal classifications"). Moreover, the liability imposed under the FLSA is for an employer's statutory and contractual obligations. *See* 29 U.S.C. §§ 207(a)(1), 216(b); 29 C.F.R. § 778.108-778.110 (1987) (personal liability for wages calculated at time and one-half the regular rate of pay specified in the collective bargaining agreement).

Consistent with her sister circuits, the First Circuit holds that dominant owner/officers can be held personally liable, as "employers", to pay wages under the FLSA, using the court-fashioned "economic reality" test. *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983). Thus, the First Circuit found an individual, who literally had no employees, liable under an FLSA provision that only applies to an employer with employees. *Id.* In so doing, the First Circuit honored substance over form. Yet, the First Circuit in the instant case and *Starrett*, honoring form over substance, refused to hold an individual personally liable under ERISA for failure to make contributions to a multiemployer plan, even though it is this self-same individual who not only was sole owner of the corporate employer but who also controlled the decision to pay or not to pay the contributions.

CONCLUSION

To hold that dominant corporate owner/officers can escape liability for delinquent contributions, notwithstanding the broad scope of the ERISA definition of "employer", undermines "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is . . . part of a 'comprehensive and reticulated statute.'" *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). For, "[h]aving heard the music, he must pay the piper." *Jim McNeff*, 461 U.S. at 271.

For the foregoing reasons and in recognition that ERISA, too, "must be read in the light of the mischief to be corrected and the end to be attained," *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940), the NCCMP respectfully urges this Court to review the decision of the court below.

Respectfully submitted,

GERALD M. FEDER
DAVID R. LEVIN *
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

Dated: January 1989

* (Counsel of Record)